

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal }
JERRY LEWIS PICTURES CORP. }

Appearances:

For Appellant: Jack W. Nakell,
Certified Public Accountant
Marvin Meyer, Attorney at Law

For Respondent: Wilbur F. Lavelle,
Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in partially denying the claim of Jerry Lewis Pictures Corp. for refund of franchise tax in the amount of \$27,061.46 for the taxable year ended March 31, 1961. The original claim of \$27,061.46 has been reduced to \$18,913.02 by respondent's allowance of a partial refund of \$8,148.44 on grounds not material to this appeal.

In January 1959 a group of individuals representing Jerry Lewis entered into an informal agreement with Paramount Pictures regarding the production of motion pictures by a corporation to be formed. Further preincorporation negotiations were then carried on in behalf of the contemplated corporation, aimed at working out the details of a formal agreement covering the production and distribution of films.

On April 3, 1959, appellant's articles of incorporation were prepared by its promoters. The articles were sent to the Secretary of State for filing on April 7, 1959, but were returned unfilled by that office on April 9, 1959, for

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the reason that the proposed corporate name, Jerry Lewis Pictures Corp., was deemed to be deceptively similar to that of another corporation, Jerry Lewis Productions, Inc.

Several weeks later appellant's promoters resubmitted its articles of incorporation under the proposed name of Gar-Ron Pictures Corp., and the articles were accepted and filed by the Secretary of State on April 27, 1959. Some months later, after obtaining the consent of Jerry Lewis Productions, Inc., the name of the new corporation was changed back to its present name; Jerry Lewis Pictures Corp. All of appellant's stock is owned by Jerry Lewis.

Appellant adopted a fiscal year ending March 31 for accounting purposes. In its franchise tax return for its second taxable year, the year ended March 31, 1961, appellant computed its tax on the basis of income earned in its first taxable year, the year ended March 31, 1960. Respondent determined that appellant's first taxable year was not a full year within the meaning of section 23222 of the Revenue and Taxation Code, and therefore the income for that year could not be used to measure the tax for the second year. Accordingly, respondent recomputed appellant's tax liability for its second taxable year on the basis of its net income for that year pursuant to section 23222. The sole question presented by this appeal concerns the propriety of the determination by respondent that appellant did not do business for a full year prior to March 31, 1960.

The California franchise tax is imposed on a corporation for the privilege of doing business in a corporate capacity in this state. (Rev. & Tax. Code, § 23151; Bank of Alameda County v. McColgan, 69 Cal. App. 2d 464 [159 P.2d 31].) A corporation's existence as a corporation commences upon the filing of its articles of incorporation by the Secretary of State. (Corp. Code, § 308.)

Respondent's regulations provide that a commencing corporation's first taxable year begins when the corporation commences to do business, which may be at any time after the articles of incorporation are filed, and rarely before the first meeting of the board of directors is held. If pre-incorporation activities which would normally constitute doing business are ratified at that first board meeting, the taxable year will be deemed to have commenced from the date of incorporation, but not prior to that date. The regulations also provide: "A de facto corporation will be treated in the same manner as a de jure corporation under this article." (Cal. Admin. Code, tit. 18, reg. 23221-23226, subd.(c).)

Appellant does not dispute the fact that its de jure existence did not commence until April 27, 1959, the date its

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articles of incorporation, as resubmitted, were filed by the Secretary of State. Appellant argues, however, that it existed as a de facto corporation as early as April 9, 1959, the date by which the articles originally submitted on April 7, 1959, would have been filed had the name of the corporation been acceptable. Appellant claims that if it had de facto existence from April 9, 1959, to April 27, 1959, when it became a de jure corporation, then it did business for more than 11-1/2 months in its first taxable year, which is all that is required under respondent's regulations. (Cal. Admin. Code, tit. 18, reg. 23221-23226, subd. (b).) Therefore, appellant concludes that it was entitled to use the income it earned in the year ended March 31, 1960, as the measure of its tax liability for the second taxable year ended March 31, 1961.

Under California law the requisites to constitute a de facto corporation are: (1) A law under which such a corporation as it purports to be might lawfully be organized; (2) a bona fide attempt to organize thereunder; and (3) an actual use of the corporate franchise. (Tulare Irrigation District v. Shepard, 185 U.S. 1 [46 L. Ed. 773]; Midwest Air Filters Pacific, Inc. v. Finn, 201 Cal. 587 [258 P. 882].)

Both logically and under the law, the bona fide attempt to organize which will suffice in establishing that a de facto corporation was formed must be "a colorable attempt to comply with the statutes authorizing the formation of such a corporation ... followed by an actual exercise of corporate functions in good faith." (Emphasis added.) Westlake Park Investment Co. v. Jordan, 198 Cal. 609, 614 [246 P. 807].)

On April 9, 1959, the date which allegedly marked the beginning of appellant's de facto existence, appellant's promoters were notified that the articles of incorporation had not been filed because of the unacceptability of the corporate name. At that point in time, therefore, they knew that they had not successfully complied with the law, and thereafter could not have exercised appellant's corporate functions under a good faith belief that they were acting on behalf of a lawful corporation.

We conclude that appellant has failed to establish that it had a de facto status prior to April 27, 1959, when it was actually incorporated. That being so, respondent has properly concluded that appellant did not do business for a full year prior to March 31, 1960, within the meaning of the pertinent statute and regulations.

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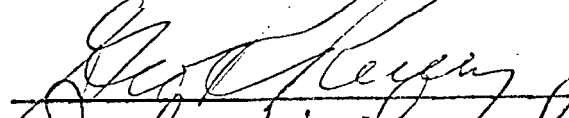
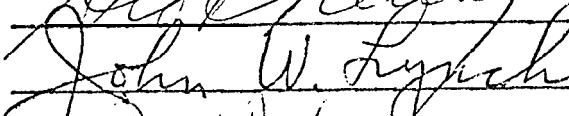
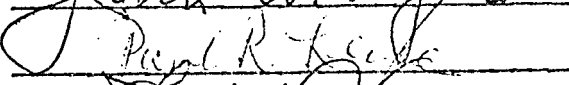
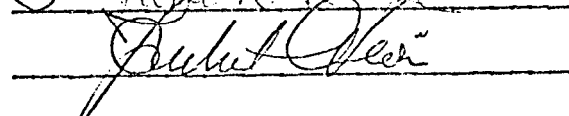
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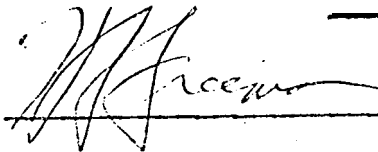
Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in partially denying the claim of Jerry Lewis Pictures Corp. for refund of franchise tax in the amount of \$27,061.46 for the taxable year ended March 31, 1961, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of October, 1966, by the State Board of Equalization.

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|  | Chairman |
|  | Member |
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Attest:



Secretary